LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
DEC 17 1958
JAMES R. BROWNING, Clerk.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 13

FEDERAL HOUSING ADMINISTRATION,
Appellant,

v.

THE DARLINGTON, INC.,
Appellee,

EX PARTE: THE DARLINGTON, INC.,
Petitioner.

PETITION FOR REHEARING

J. C. LONG,
90 Broad Street
P. O. Box 242
Charleston, S. C.

W. TURNER LOGAN,
90 Broad Street
P. O. Box 242
Charleston, S. C.

HEMAN H. HIGGINS, JR.,
P. O. Box 186
Georgetown, S. C.
Attorneys for Petitioner.

INDEX

Page

FIRST: The Court has created a brand-new field subject to direct Congressional legislative regulation, and has placed the operations of The Darlington, Inc., therein 1

SECOND: The Court has conferred upon the Federal Housing Commissioner regulatory powers which were neither conferred nor intended to be conferred by Congress 3

THIRD: The Court has subjected The Darlington, Inc., to arbitrary regulation by the Federal Housing Commissioner, without any of the safeguards of administrative due process 8

FOURTH: The Court has misconstrued the present authority of the Federal Housing Commissioner to approve transient rentals under Section 513 (b) of the 1954 Housing Act 10

FIFTH: The Court has overlooked controlling evidence of the prior administrative interpretation of Section 608 with respect to transient rentals 14

SIXTH: The Court has overlooked the fact that, because of Constitutional limitations on any form of direct regulation, the charter of The Darlington, Inc., which does not prohibit transient rentals, constitutes a contract between the corporation and the United States which may not be varied by subsequent legislation nor regulation 18

Conclusion 22

Certificate of Counsel 23

Page

Cases:

Arthur v. Cumming, 91 U. S. 362 7

Bank of the United States v. The Planters' Bank of Georgia, 9 Wheat. 904 19

Burnet v. Guggenheim, 288 U. S. 280 13

Fleming v. Rhodes, 331 U. S. 100 2

Louisville, Cincinnati & Charleston R. R. Co. v. Letson, 2 How. 497 19

Oates v. First National Bank of Montgomery, 100 U. S. 239 13

Raleigh and Gaston R. R. Co. v. John A. Reid, Sheriff, etc., 13 Wall., 269 7

Schechter Poultry Corporation v. United States, 295 U. S. 495 9

Trustees of Dartmouth College v. Woodward, 4 Wheat. 518 19

United States v. Kirby, 7 Wall. 482 13

United States v. Wunderlich, 342 U. S. 98 10

Statutes:

Housing Act of 1954, 68 Stat. 590 ..... 12, 14, 16, 17

National Housing Act, 55 Stat. 55, as amended, 12 U. S. C. 1742:
Sec. 607 4

National Housing Act, 56 Stat. 303, as amended, 12 U. S. C. 1743:
Sec. 608 ..... 4, 7, 14, 15, 17, 20, 21, 22

Page

Sec. 608 (b) (1) 4, 5, 16, 20

National Housing Act, Sec. 513 (b), added by Sec. 132 (b) of the Housing Act of 1954, 68 Stat. 610, 12 U. S. C. (Supp. V) 1731 (b) 10, 11, 12, 14

63 Stat. 905 15

64 Stat. 57 15

Miscellaneous:

24 C. F. R. 280.1 through 280.41 20

24 C. F. R. 280.29 ..... 5, 20

24 C. F. R. 282.1 through 282.20 20

24 C. F. R. 282.19 21

Federal Housing Administration 23rd Annual Report:
Table III–7; p. 21 3

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 13

FEDERAL HOUSING ADMINISTRATION,
Appellant,

v.

THE DARLINGTON, INC.,
Appellee,

EX PARTE: THE DARLINGTON, INC.,
Petitioner.

PETITION FOR REHEARING

The Darlington, Inc., Petitioner above-named, respectfully petitions for a rehearing upon the following grounds:

FIRST

The Court has created a brand-new field subject to direct Congressional legislative regulation, and has placed the operations of The Darlington, Inc., therein.

The majority opinion, we respectfully submit, erroneously holds that The Darlington, Inc., the appellee housing corporation, is subject to continuing subsequent Federal legislation, asserting as authority for such holding, and we quote:

"As stated in *Fleming* v. *Rhodes*, 331 U. S. 100, 107, 'Federal regulation of future action based upon rights previously acquired by the person regulated is not prohibited by the Constitution. So long as the Constitution authorizes the subsequently enacted legislation, the fact that its provisions limit or interfere with previously acquired rights does not condemn it. Immunity from federal regulation is not gained through forehanded contracts.'

"• • • Congress by the 1954 Act was doing no more than protecting the regulatory system which it had designed. Those who do business in the regulated field cannot object if the legislative scheme is buttressed by subsequent amendments to achieve the legislative end."

The majority opinion correctly asserts that:

"Appellee is a South Carolina corporation formed in 1949 to obtain FHA mortgage insurance for an apartment house to be constructed in Charleston. The insurance issued and the apartment was completed."

The appellee petitioner herein recognizes that those who do business in certain fields over which the Constitution has expressly given Congress control, do so subject to the continuing subsequent legislative powers of the Federal government to govern and control such businesses or activities. Examples include the war power under which *Fleming* v. *Rhodes*, *supra*, was decided, the commerce clause, the general welfare clause, the monetary clause, etc., of the Constitution. However, neither the facts in the instant case nor the determination of any issue in the case are in any way involved in or remotely concerned with any of these paramount constitutional legislative powers of Congress.

The effect of the majority opinion is, therefore, to hold for

the first time in the history of this Court that a private corporation, chartered by a State, not engaged in interstate commerce, or in any other business or activity under a constitutional grant of any license, franchise or privilege by the Federal government, is nevertheless subject to continuing subsequent legislative control by the Federal government without the protection afforded by the Due Process Clause of the Constitution.

The majority opinion thereby creates a new legislative "regulated field"—namely, the private housing industry—a commercial area which is completely outside the purview of any of the paramount constitutional powers of Congress which permit subsequent legislation affecting previously acquired rights.

The Darlington, Inc., a South Carolina corporation engaged only in intra-state activity, is immune in the operation of its property from any subsequent control of its operations by any act of Congress until it is shown that the general welfare or war power of the country is involved. There is no suggestion of such power being involved in the present case. Therefore, to apply the subsequent legislative provisions of a Federal statute to its operations, as the majority opinion asserts, is an unheard of, revolutionary innovation in judicial interpretation, placing the approximately 7,000 Section 608 project owners (R. 96) and the holders of the insured mortgages over such projects, with investments running in excess of Three Billion Four Hundred Millions of Dollars (FHA, 23rd Annual Report, Table III–7, p. 21), in the chaotic position of never knowing from day to day when subsequent legislation may be passed affecting their contractual or property rights, a result which we do not believe the majority of the Court intended.

SECOND

The Court has conferred upon the Federal Housing Com-

missioner regulatory powers which were neither conferred nor intended to be conferred by Congress.

The majority opinion, we respectfully submit, erroneously asserts that the operations of The Darlington, Inc., are in a "regulated field," subject and amenable to the continuing subsequent regulations of the Federal Housing Commissioner, the language of the opinion being:

> "Those who do business in the regulated field cannot object if the legislative scheme is buttressed by subsequent amendments to achieve the legislative end."

The majority opinion, therefore, confers on the Federal Housing Commissioner subsequent regulatory functions not conferred or intended, but in fact specifically prohibited by the very statute under consideration—Section 608 of the National Housing Act. It is true that Section 607 of the Housing Act provides:

> "Sec. 607. The Commissioner is authorized and directed to make such rules and regulations as may be necessary to carry out the provisions of this title."

However, Section 608 specifically prohibits the control of the operation of a project insured under the terms of that Act through subsequent regulations of the Federal Housing Commissioner, and specifically provides and limits the manner in which the Federal Housing Commissioner may control the operation of a corporation insured under Section 608. The Act provides (Sec. 608(b) (1)):

> "(1) The mortgaged property shall be held by a mortgagor approved by the Commissioner. The Commissioner may, in his discretion, require such mortgagor to be regulated or restricted as to rents or sales, charges, capital structure, rate of return, and methods of operation. The Commissioner may make such contracts with, and acquire

for not to exceed $100 stock or interest in any such mortgagor, as the Commissioner may deem necessary to render effective such restriction or regulation."

Pursuant to the terms of the Act above set forth, authorizing the Federal Housing Commissioner in his discretion to control the manner of the operations of a 608 insured project such as The Darlington, Inc., the Federal Housing Commissioner promulgated the following rule (24 C. F. R. 280.29):

"Section 280.29. *Regulation of mortgagor by Commissioner in general.* A corporate mortgagor shall be regulated through the ownership by the Commissioner of certain shares of special stock (or other evidence of beneficial interest in the mortgagor) which stock or interest will acquire majority voting rights in the event of default under the mortgage or violation of provisions of the charter of the mortgagor or the violation of any valid agreement entered into between the mortgagor, the mortgagee and/or the Commissioner, but only for a period coextensive with the duration of such default or violation.

Such regulation and the additional regulation or restriction provided in Sections 280.30 to 280.32, inclusive, shall be made effective by incorporation of appropriate provisions therefor in the charter or other instrument under which the mortgagor is created, or by agreement. In all cases where the insured mortgage is in excess of $200,000, the mortgagor must be a corporation or trust."

Reference to the charter of the corporation (Pl. Ex. 19; R. 184) will show that the only control that could be exercised by the Federal Housing Commissioner over the corporation was limited to the occurrence of a default by the corporation as listed in the charter. In such event the Federal Housing Com-

missioner, in his capacity as preferred stockholder and not otherwise, was authorized to take over the operation of the corporation by the election of directors of the choice of the Federal Housing Commissioner as preferred stockholder, Article Fifth (e) of the charter reading (Pl. Ex. 19; R. 186):

> "(e) In the event of any default by the corporation, as hereinafter defined, and during the period of such default, the holders of the Preferred Stock voting as a class, shall be entitled to remove all existing directors of the corporation, and to elect new directors in their stead***."

Article Seventh (a) of the charter lists the happenings constituting a default, the said Article Seventh (a) reading (Pl. Ex. 19; R. 187-188):

> "Seventh: (a) The happening of any of the following events shall constitute a default within the meaning of that word as used in this certificate: (1) the failure of the corporation to have dismissed within thirty days after commencement, any receivership, bankruptcy or other form of liquidation instituted by or against the corporation; (2) the failure of the corporation to pay the principal, interest, or any other payment due on any note, bond or other obligation executed by it, as called for by the terms of such instruments; (3) the failure of the corporation to establish and maintain the reserve fund for replacements provided for in Article Fifth, Section (d) hereof or the use of such fund except as permitted in said section; (4) the failure of the corporation, continuing for a period of fifteen days, to perform any of the covenants, conditions or provisions required by it to be performed by this certificate, the by-laws of the corporation, the mortgage, or any contract to which the corporation and the Commissioner shall be parties, or fail to

> carry out in full the terms of any agreement whereby the loan covered by the insured mortgage is to be advanced or the project is to be constructed and operated."

We respectfully submit that as shown by the specific wording of Section 608 of the National Housing Act and the rules and regulations of the Federal Housing Commissioner, Congress has specifically prohibited the Federal Housing Commissioner from imposing any subsequent control of a corporation operating a Section 608 housing project through the medium of subsequent regulations, and has specifically limited any control over such corporations exclusively to such control as the Commissioner may have seen fit to impose through charter provisions.

We submit that the statute law having provided one way—and one way only—for the control of the operation of a Section 608 housing project such as The Darlington, Inc., namely through the ownership of preferred stock in such corporation, the mandate of the statute could not be circumvented by regulations of the Commissioner or otherwise, for as this Court has consistently held from its earliest decisions, whenever a statute limits a thing to be done in a particular way, that way and no other must be followed to accomplish the objective:

> "***for when a statute limits a thing to be done in a particular mode, it includes a negative of any other mode." *Raleigh and Gaston RR. Co.*, v. *John A. Reid, Sheriff*, etc., 13 Wall., 269, 270.

See also *Arthur* v. *Cumming*, 91 U. S. 362, 364.

It is further respectfully submitted that the majority opinion, in holding that corporations such as The Darlington, Inc., were in a "regulated field" and amenable to subsequent regulations, could not have fully appreciated the statutory requirements that if control of such corporations was to be effected, the

same was to be effected only through charter provisions, and certainly the charter did not provide for any subsequent control of the corporation through regulations of the Federal Housing Commissioner but, as stated, subsequent control was limited to the Commissioner, as preferred stockholder, taking over the operation of such corporations if a default occurred in the charter provisions.

We also respectfully submit that Congress was fully cognizant of its lack of authority to subject a private corporation, engaged in a purely intra-state business, to regulation by a Federal agency; and that Congress was also cognizant of the fact that the Federal Housing Commissioner was not constituted as a regulatory body, and that the only means by which the Federal Housing Commissioner could effect any regulation of or exercise any control over such corporation was by charter provisions coupled with stock ownership in the corporation. This was, therefore, the reason for the provisions in the Act for the Commissioner's ownership of special stock or interest in the mortgagor corporation, and we respectfully submit that the majority opinion overlooks these facts and in effect grants to the Federal Housing Commissioner regulatory powers which Congress never intended that he have.

THIRD

The Court has subjected The Darlington, Inc., to arbitrary regulation by the Federal Housing Commmissioner, without any of the safeguards of administrative due process.

Should the majority of this Court, regardless of what is shown in the First and Second Grounds above, continue to be of the opinion that those who deal with the Federal Housing Commissioner are operating in a regulated field and are there-

fore amenable to subsequent legislation and regulation, we submit that such holding will for the first time in the history of the United States subject the purely intra-state operations of a State-chartered private corporation to continuing subsequent Federal legislation and regulation. Until this decision, such Federal regulation of purely intra-state business operations has always been held to be beyond any Congressional power except in time of war. As was said by this Court in *Schechter Poultry Corporation* v. *United States*, 295 U. S. 495, 548:

> "If the commerce clause were construed to reach all enterprises and transactions which could be said to have an indirect effect upon interstate commerce, the federal authority would embrace practically all the activities of the people, and the authority of the state over its domestic concerns would exist only by sufferance of the federal government. Indeed, on such a theory, even the development of the state's commercial facilities would be subject to federal control."

Furthermore, to subject The Darlington, Inc., to future regulation by the Federal Housing Administration would be completely unprecedented and would amount to depriving The Darlington, Inc., of its property without due process of law. The Federal Housing Administration, unlike a regulatory agency, does not consist of a commission or a board, but of a single executive head: namely, the Commissioner—yet, as the majority holds, he is empowered to make subsequent rules and regulations affecting the property rights of those who do business with him without affording to them any of the fundamental constitutional safeguards of administrative due process: namely, notice, an opportunity to be heard, and an opportunity for judicial review.

We cannot believe that the majority of this Court intended

to subject those who do business with the Federal Housing Commissioner to his unrestricted whims. Such a situation would produce results literally comparable with those which Mr. Justice Douglas deplored in his dissenting opinion in *United States* v. *Wunderlich*, 342 U. S. 98, 101, wherein he stated:

> "But the rule we announce has wide application and a devastating effect. It makes a tyrant out of every contracting officer. He is granted the power of a tyrant even though he is stubborn, perverse or captious. He is allowed the power of a tyrant though he is incompetent or negligent. He has the power of life and death over a private business even though his decision is grossly erroneous. Power granted is seldom neglected."

FOURTH

The Court has misconstrued the present authority of the Federal Housing Commissioner to approve transient rentals under Section 513 (b) of the 1954 Housing Act.

We submit that the majority opinion erroneously asserts that whenever the public interest requires it, the Federal Housing Commissioner is now authorized under the express terms of the 1954 Act, Section 513 (b), to permit transient rentals in any FHA-insured Section 608 housing project such as The Darlington, Inc., the majority opinion reading:

> "It is true that FHA felt it had the authority to approve rental schedules for transients. It gave such approval in a dozen or more instances where it felt the public interest required it. We need not stop to inquire whether FHA had that authority.[8]
>
> • • • • •
>
> "[8]The 1954 Amendment expressly gave FHA that power in Section 513 (b)."

We respectfully submit that Section 513 (b), as will be shown from a reading of the same, far from authorizing the Federal Housing Commissioner to approve transient rentals, in fact prohibits him from now approving any transient rentals, even though the public interest requires such approval, unless (a) there was already in existence prior to the 1954 Act a written agreement between the Commissioner and an apartment owner in which the Commissioner agreed to such transient rentals or (b) the transient rentals occurred prior to the 1954 Act in an area which the Commissioner now determines to be a resort area. Section 513 (b) reads:

> "(b) Notwithstanding any other provisions of this Act, no new, existing, or rehabilitated multifamily housing with respect to which a mortgage is insured under this Act shall be operated for transient or hotel purposes unless (1) on or before May 28, 1954, the Commissioner has agreed in writing to the rental of all or a portion of the accommodations in the project for transient or hotel purposes (in which case no accommodations in excess of the number so agreed to by the Commissioner shall be rented on such basis), or (2) the project covered by the insured mortgage is located in an area which the Commissioner determines to be a resort area, and the Commissioner finds that prior to May 28, 1954, a portion of the accommodations in the project had been made available for rent for transient or hotel purposes (in which case no accommodations in excess of the number which had been made available for such use shall be rented on such basis)."

Although the above-quoted Section 513 (b) ratifies and confirms those transient rentals agreed to in writing by the Commissioner on or before May 28, 1954, it prohibits him from making such agreements after that date. The only dis-

cretion left to the Commissioner by Section 513 (b), with reference to transient rentals, is the discretion granted him to determine what constitutes a "resort area."

This interpretation is confirmed by the testimony of the Director of the Legal Division of the Federal Housing Administration, Adolphus M. Prothro, who, in answer to questions by the Government's trial counsel in this case, stated that although at one time the Commissioner felt that he "could waive the charter provision and permit on such terms as he prescribed a transient operation" (R. 96), the Commissioner interpreted the 1954 Act as changing the intent of Congress and precluding any transient rentals (R. 98).

Mr. Prothro's exact testimony is here set out:

> "Q. As I understand your testimony, FHA at one time at least took the position that the Commissioner since he was authorized to regulate the method of operation of the apartments could waive the charter provision and permit on such terms as he prescribed a transient operation; is that correct? A. That is correct. That was the official position taken." (R. 96)
>
> "Q. After the passage of the 1954 Act was there a change in the opinion of the FHA as to whether under the term 'methods of operation' they could in their discretion upon application permit transient rentals? A. There was a *definite change in our interpretation of the intent of Congress* from that time forward because we now felt that there was no discretionary authority in FHA to approve transient rentals." (R. 98; emphasis added.)

Although the majority of the Court seems to be under the impression that The Darlington, Inc., has some unspecified administrative remedy whereby foreclosure can be avoided,

it is admitted that no agreement for transient rentals existed between The Darlington, Inc., and the Commissioner prior to May 28, 1954, and there is no way of knowing whether the Commissioner would determine Charleston to be a resort area. Therefore, since the Commissioner does not have the authority which the majority attributes to him, to approve transient rentals, the majority opinion results in a construction that leads to injustice and oppression and produces absurd consequences, for it is admitted that without the revenue derived from transient rentals The Darlington, Inc., will be unable to meet the payments called for by its insured mortgage and foreclosure will inevitably follow, with resultant substantial loss to the Government (R. 114).

This Court has heretofore consistently rejected statutory interpretations that lead to such unjust results.

In *United States* v. *Kirby*, 7 Wall. 482, this Court, in construing an act of Congress, held:

> "All laws should receive a sensible construction. General terms should be so limited in their application as not to lead to injustice, oppression, or an absurd consequence. It will always, therefore, be presumed that the Legislature intended exceptions to its language, which would avoid results of this character. The reason of the law, in such cases, should prevail over its letter."

Again, in *Oates* v. *First National Bank of Montgomery*, 100 U. S. 239, this Court said:

> "****and we should discard any construction that would lead to absurd consequences."

This rule was thus reiterated in *Burnet* v. *Guggenheim*, 288 U. S. 280, 285:

> "A statute will be construed in such a way as to avoid unnecessary hardship when its meaning is uncertain."

Believing as we do that the majority opinion has erroneously construed Section 513 (b) of the Housing Act of 1954 as permitting the Commissioner to approve transient rentals in Section 608-insured projects whenever he deems that the public interest justifies such transient rentals, whereas in fact Section 513 (b) prohibits the Commissioner from approving any such transient rentals even though in his judgment such approval of transient rentals is demanded by the public interest, we cannot believe that the result of the majority's opinion, namely, the destruction of The Darlington, Inc., and other corporations similarly situated, with the resulting substantial loss to the Government, was intended or desired by the majority. Such construction would lead to oppressive and absurd consequences and would produce unnecessary hardships and injustice, all of which constructions this Court has consistently avoided.

FIFTH

The Court has overlooked controlling evidence of the prior administrative interpretation of Section 608 with respect to transient rentals.

It is respectfully submitted that the following assertions in the majority opinion are erroneous:

> "The contemporaenous construction of the Act by the agency entrusted with its administration is squarely to the contrary.' [I.e., is against transient rentals].****** When Congress passed the 1954 Amendment, it accepted the construction of the prior Act which bars rentals to transients."

The majority opinion cites a letter from the Washington office of the Federal Housing Administration to the field offices dated August 10, 1951 (Def. Ex. 10; R. 247, 250), as sustaining the conclusions that the Federal Housing Adminis-

tration had contemporaneously construed Section 608 of the Housing Act as prohibiting transient rentals, the Court in its opinion stating as follows:

> "In a letter to field offices in 1951 explaining the criteria to be considered in passing on rent schedules and methods of operation, the FHA instructed them to: ' . . . bear in mind that the objective of this Administration is the production of housing designed for the (sic) occupaney of a relatively permanent nature and that transient occupancy is contrary to policy. No approval will be granted with respect to a proposal anticipating transient occupancy.' "

We respectfully call to the Court's attention that as the record discloses, and the majority opinion asserts, the mortgage in this case was insured in 1949. The letter relied upon by the Court was therefore not a contemporaenous construction by FHA but came approximately two years after the respective rights of The Darlington, Inc., and the Federal Housing Commissioner had been fixed by charter and stock issue, and the letter referred to by the majority opinion as a contemporaneous construction was not, in fact, even written until more than a year after the expiration of Section 608 on March 1, 1950. We quote from Note 2, page 4 of the Appellant's Brief:

> "[2]The authority to insure mortgages under Section 608 has been withdrawn as to all applications received after March 1, 1950, 63 Stat. 905, 64 Stat. 57."

We further respectfully submit that the only evidence of a *contemporaneous* construction by the Commissioner in reference to his rights relating to transient rentals in a Section 608 project, contained within the record of this case, is to be found in the testimony of Mr. Arthur J. Packard, President of the American Hotel Association, before the Committee on

Banking and Currency of the United States Senate, and from the testimony in this case of Mr. Adolphus M. Prothro, Director of the Legal Division of the Federal Housing Administration. We quote from the testimony of the President of the American Hotel Association before the Committee on Banking and Currency (Pl. Ex. 27; R. 195, 198):

> "As I mentioned before, we have tried for 4 or 5 years to achieve an administrative solution to this problem. Officials of FHA have generally been quite sympathetic. Section 1743 (b) (1), in connection with section 608 properties, gave the Administrator authority to regulate rents, charges, and methods of operation. But counsel for the FHA has viewed narrowly this authorization. *He contends that it does not confer power upon the agency to impose regulations after the eligibility of the mortgagor has been approved.* At the outset, the agency always required approval of all rent schedules, and these were normally expressed in monthly rentals. *But FHA counsel now takes the position that if one of these apartment buildings rents a room overnight for not more than one-thirtieth of the approved monthly rental, the agency has no basis for prohibiting the operator from maintaining such practice.*" (Emphasis added.)

It is significant to note that prior to the 1954 Act it was the settled and matured view of the Commissioner's own legal advisers that the Commissioner's authority to regulate "rents, charges, and methods of operation" did *not* confer upon the Commissioner any power to impose regulations upon a mortgagor corporation "after the eligibility of the mortgagor has been approved;" i.e., after the Commissioner has issued his endorsement insuring the mortgage. This is precisely the view of the petitioner, The Darlington, Inc., and the reason The Darlington, Inc., felt that it did not have to ask the

Commissioner to approve its transient rentals.

We now quote from the testimony of the Director of the Legal Division of the Federal Housing Administration in reference to his interpretation as to whether Section 608 of the Housing Act prohibited transient rentals (R. 92):

> "Q. In connection with your interpretation here that the Act prohibits any transient rentals, even prior to the '54 amendment, is it or is it not a fact that the Federal Housing Administration office in Washington assisted a 608 owner in having his apartment house designated a hotel to comply with the District zoning law? A. I will answer that this way: *My affidavit does not say that the statute prohibited transient rentals.*" (Emphasis added.)

We submit that the record in this case is conclusive of the fact that prior to the 1954 Housing Act the Federal Housing Commissioner not only had never interpreted or construed Section 608 of the Act as prohibiting transient rentals, but on the contrary had affirmatively construed the Act as permitting transient rentals provided that a rental charge per day of not more than one-thirtieth of the monthly approved rental charge was required of the transient tenants.

We further submit that such construction permitting transient rentals by those in charge of the Federal Housing Administration was a controlling and motivating factor in causing Congress to pass the 1954 Housing Act prohibiting transient rentals, but which Act by the very terms thereof condoned prior acts of the Commissioner in permitting transient rentals.

We further respectfully submit that since the record in this case overwhelmingly shows that the contemporaneous construction of Section 608 of the Housing Act by the Federal Housing Commissioner permitted transient rentals in projects such as The Darlington, Inc., the majority opinion must neces-

sarily have been reached without full appreciation of the facts set forth in the record.

SIXTH

The Court has overlooked the fact that, because of Constitutional limitations on any form of direct regulation, the charter of The Darlington, Inc., which does not prohibit transient rentals, constitutes a contract between the corporation and the United States which may not be varied by subsequent legislation nor regulation.

Upon reflection, we who represent The Darlington, Inc., feel that we failed in our Brief and argument before the Court to properly bring to the Court's attention the real issue in this case, and that it is our duty not only to our client but to this Court to do so even at the risk of being charged with trying to reargue the case in this Petition for Rehearing.

We feel that we were at fault for failing to make clear to the Court that the relationship between The Darlington, Inc., and the Commissioner is a contractual relationship measured exclusively by the terms of the charter of The Darlington, Inc., and the Commissioner's rights as preferred stockholder thereunder, and for failing to appropriately point out to the Court that the Government itself recognized and admitted this fact in its Brief in this Court as hereinatfer set forth.

We have already pointed out that Congress adopted the device of having the Commissioner become the holder of a special class of stock in Section 608 corporations in order to regulate such corporations, because Congress realized that it could not constitutionally regulate such corporations directly. We take it that Congress did so with full recognition of the long-established principle that a corporation's charter constitutes a contract between the corporation and each class of its stockholders, which neither the corporation nor any class

of stockholders may change without the consent of all, and also with full recognition that when a government becomes a stockholder in a private corporation, it divests itself of its sovereign character insofar as the transactions of that corporation are concerned.

This last-mentioned principle was thus enunciated by this Court in *Louisville, Cincinnati & Charleston R. R. Co.* v. *Letson*, 2 How. 497, 551, quoting with approval from *Bank of the United States* v. *The Planters' Bank of Georgia*, 9 Wheat. 904, 907, as follows:

> "[It is, we think, a sound principle,] that when a government becomes a partner in a trading concern, it devests itself, so far as concerns the transactions of that company, of its sovereign character, and takes that of a private citizen."

In accordance with this rule, the Commissioner's rights as sole preferred stockholder in The Darlington, Inc., are no greater than those of any private individual holding stock with identical preferences. Congress not having seen fit to reserve to the Commissioner the right to require Section 608 corporations to amend their charters so as to include subsequent regulatory provisions not included in their original charters, neither Congress nor the Commissioner can now do so, the present case being in this respect identical with *Trustees of Dartmouth College* v. *Woodward*, 4 Wheat. 518, cited on page 58 of our original Brief.

We therefore respectfully submit that there is but one and only one real issue in this case—Did the provisions of the charter of The Darlington, Inc., prohibit transient rentals?

Because of the Constitutional considerations already mentioned, the statute itself provided that there was to be but one way in which the Commissioner could control the methods

of operation of a Section 608 insured project, as set out in Section 608 (b) (1) as follows:

> "***The Commissioner may, in his discretion, require such mortgagor to be regulated or restricted as to rents or sales, charges, capital structure, rate of return, and methods of operation. The Commissioner may make such contracts with, and acquire for not to exceed $100 stock or interest in any such mortgagor, as the Commissioner may deem necessary to render effective such restriction or regulation."

Pursuant to this statute, the regulations of the Commissioner provided that there was to be one way—and one way only—in which the Commissioner could exercise any control over the operation of a Section 608 insured corporation (24 C. F. R. 280.29):

> "A corporate mortgagor shall be regulated through the ownership by the Commissioner of certain shares of special stock***."

An examination of the regulations promulgated by the Commissioner in implementation of Section 608 discloses that they are concerned exclusively with establishing standards which must be met to make a mortgage eligible for insurance under Section 608 (24 C. F. R. Secs. 280.1 through 280.41 and 282.1 through 282.20). Up to the very moment when the Commissioner issued his endorsement insuring a mortgage, the Commissioner could require any prospective mortgagor, as a condition precedent to having its mortgage insured, to insert in its charter any additional regulatory provisions that he might deem desirable, but once the Commissioner issued his endorsement insuring the mortgage, such act constituted his acceptance of the preferred stock having such rights, and only such rights, as were set out in the particular charter, and from

and after that moment his rights, as well as those of the mortgagor, were forever fixed within the four corners of the mortgagor's charter of incorporation.

We submit that the Commissioner, in order to protect all parties and to eliminate any and all questions that might arise as to any party's rights, adopted and promulgated the following regulation (24 C. F. R. 282.19):

> "The regulations in this part may be amended by the Commissioner at any time and from time to time, in whole or in part, but such amendment shall not affect the contract of insurance on any mortgage already insured or any mortgage or prospective mortgage on which the Commissioner has made a commitment to insure."

The Appellant in its very Brief in this case, we submit, has admitted that any rights of control of the Federal Housing Commissioner over a corporation insured under the provisions of Section 608 are specifically limited to such rights as are found within the four corners of the charter provisions. We quote from Appellant's Brief, page 5:

> "In order to regulate the mortgagor, the Commissioner was to receive 'certain shares of [the mortgagor's] special stock' which would confer majority voting rights in the event of default under the mortgage, charter or any other agreement between the mortgagor and the Commissioner."

We quote also Note 7, page 9 of Appellant's Brief:

> "'This and all other powers afforded the Administration under appellee's charter result from the Administration's ownership of appellee's preferred stock."

Reference to the charter will show that consideration was given to the term of rentals of apartments in a Section 608 insured project and that there is no prohibition expressed or

implied against transient rentals. The only provision in the charter dealing with term of rentals will be found in Article Eighth (a) (1), which reads (Pl. Ex. 19; R. 184, 189):

> "Dwelling accommodations of the corporation shall not be rented for a period in excess of three years nor shall the property be rented as an entirety without prior written approval of the Preferred Stockholders."

As we have shown, there was no limit to the Commissioner's powers in reference to such regulatory provisions as he may have seen fit to impose through the provisions of the charter of any corporation insured under Section 608 of the Act. Likewise, a mortgagor could have accepted or refused a charter containing provisions that were objectionable. The simple facts in the present case are that the Commissioner imposed no restrictions against transient rentals in any provisions of the charter of The Darlington, Inc. The charter being a contract between the parties, under the decisions of this Court the Commissioner and everyone else are constitutionally barred from now imposing regulations against transient rentals. The provisions of the charter control and must prevail.

CONCLUSION

In view of the substantial constitutional and other issues involved in this case, and for the foregoing reasons and upon the foregoing grounds, the petitioner herein respectfully submits that this petition presents substantial issues overlooked by the majority opinion and not previously passed upon. In view of the import of the decision with its disastrous results to the petitioner and many others similarly situated, leaving the petitioner no relief or remedy of any kind at all, and in view of the unforeseen and far-reaching consequences of the decision and its effect upon those with whom the Federal Housing Administration has done or may hereafter wish to do

business, we respectfully submit that the Court will be amply justified in granting a rehearing of this case with time allocated for full argument.

J. C. LONG

W. TURNER LOGAN

HEMAN H. HIGGINS, JR.

Attorneys for Petitioner.

We, the undersigned attorneys for the petitioner above named, hereby certify that in our opinion the foregoing petition for rehearing is presented in good faith and not for delay.

J. C. LONG

W. TURNER LOGAN

HEMAN H. HIGGINS, JR.